

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

FACSIMILE

(202) 955-8792

www.kelleydrye.com

NEW YORK, NY

TYSONS CORNER, VA

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES

JAKARTA, INDONESIA

MUMBAI, INDIA

DIRECT LINE: (202) 887-1211

EMAIL: bfreedson@kelleydrye.com

April 26, 2005

VIA EMAIL AND OVERNIGHT DELIVERY

Mary Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Boston, Massachusetts 02110

Re: D.T.E. 04-33: Petition of Verizon New England Inc. for Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts, Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*

Dear Ms. Cottrell:

A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, Broadview Networks Inc. and Broadview NP Acquisition Corp., Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., DIECA Communications, Inc. d/b/a Covad Communications Company, DSCI Corp., IDT America Corp., KMC Telecom V, Inc., and XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.), members of the Competitive Carrier Group, hereby submit this Reply Brief to Additional Briefing Issues in the above-referenced proceeding before the Massachusetts Department of Telecommunications Energy.

Enclosed for filing please find an original and seven (7) copies of this filing, a duplicate and a self-addressed, postage-paid envelope. Please date-stamp the duplicate upon receipt and return it in the envelope provided. Please feel free to contact the undersigned counsel at (202) 887-1211 if you have any questions or require further information.

Respectfully submitted,



Brett Heather Freedson

CERTIFICATE OF SERVICE

I, Brett Heather Freedson, hereby certify that true and correct copies of the foregoing Reply Brief of the Competitive Carrier Group to Additional Briefing Issues, in D.T.E. 04-33, were delivered this 26th day of April 2005 to the individuals on the following list:

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
phone: (617) 305-3500
fax: (617) 345-9101
email: mary.cottrell@state.ma.us

Tina W. Chin, Hearing Officer
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
phone: (617) 305-3578
fax: (617) 345-9103
email: Tina.Chin@state.ma.us

Michael Isenberg, Director, Telecommunications Division
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
phone: (617) 305-3744
fax: (617) 478-2588
email: Mike.Isenberg@state.ma.us

April Mulqueen, Assistant Director, Telecommunications Division
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
phone: (617) 305-3748
fax: (617) 478-2588
email: April.Mulqueen@state.ma.us

Paula Foley, Assistant General Counsel
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
phone: (617) 305-3608

fax: (617) 345-9103
email: Paula.Foley@state.ma.us

Ashish Shrestha, Analyst, Telecommunications Division
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
phone: (617) 305-3743
fax: (617) 478-2588
email: Ashish.Shrestha@state.ma.us

Deborah Alexander, Analyst, Telecommunications Division
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
phone: (617) 305-3705
fax: (617) 478-2588
email: Deborah.Alexander@state.ma.us

Stella Finn, Analyst, Telecommunications Division
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
phone: (617) 305-3749
fax: (617) 478-2588
email: Stella.Finn@state.ma.us

Karlen J. Reed, Assistant Attorney General
Utilities Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
phone: (617) 727-2200 ext. 2414
fax: (617) 727-1047
e-mail: karlen.reed@ago.state.ma.us
Bruce P. Beausejour
Barbara Anne Sousa
Ellen M. Cummings
Verizon New England, Inc. d/b/a Verizon Massachusetts
185 Franklin Street, 13th Floor
Boston, MA 02110-1585
phone: (617) 743-7331
fax: (617) 737-0648

email: Bruce.P.Beausejour@verizon.com; Barbara.A.Sousa@verizon.com;
Ellen.M.Cummings@verizon.com

Jay E. Gruber
Michelle Consalvo
AT&T Communications of New England, Inc.
99 Bedford Street, 4th Floor
Boston, MA 02111
phone: (617) 574-3149
fax: (617) 574-3274
email: jegruber@lga.att.com; mconsalvo@lga.att.com

Brian Kelleher
AT&T
14 Mark Lane
New City, NY 10956
phone: (845) 639-4687
fax: (845) 708-6023
email: bkelleher@lga.att.com

Gregory Hoffman
AT&T
32 Avenue of the Americas
New City, NY 10013
phone: (212) 387-4701
fax: (281) 664-9946
email: greghoffman@lga.att.com

Kenneth W. Salinger
Ruth T. Dowling
Palmer and Dodge LLP
111 Huntington Avenue
Boston, MA 02199
phone: (617) 239-0657
fax: (617) 227-4420
email: ksalinger@palmerdodge.com; rdowling@palmerdodge.com

For: AT&T Communications of New England, Inc.; ACC Telecom Corp.; TCG Massachusetts

Richard C. Fipphen
Senior Counsel
Law and Public Policy, New York/New England Region
MCI, Inc.

DC01/FREEB/232752.1

200 Park Avenue, 6th Floor
New York, NY 10166
phone: (212) 519-4624
fax: (212) 519-4811
email: richard.fipphen@mcj.com

Karen R. Sistrunk
Senior Attorney
Sprint Communications Company L.P.
401 Ninth Street, N.W., Suite 400
Washington, D.C. 20004
phone: (202) 585-1940
fax: (202) 585-1893
email: Karen.r.sistrunk@mail.sprint.com

Russell M. Blau
Michael W. Fleming
Philip J. Macres
Swidler Berlin Shereff Friedman, LLP
The Washington Harbour
3000 K Street, NW, Suite 300
Washington, DC 20007-5116
phone: (202) 424-7869
fax: (202) 424-7643
email: rmbrau@swidlaw.com; mwfleming@swidlaw.com; pjmacres@swidlaw.com

Genevieve Morelli
Brett Heather Freedson
Kelly Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
phone: (202) 955-9600
fax: (202) 955-9792
email: gmorelli@kelleydrye.com; bfreedson@kelleydrye.com

Douglas S. Denny-Brown
General Counsel
RNK Inc. d/b/a RNK Telecom
333 Elm Street, Suite 310
Dedham, MA 02026
phone: (781) 297-9831
fax: (781) 297-9836
e-mail: dougdb@rnktel.com

DC01/FREEB/232752.1

Andrew Klein
Piper Rudnick LLP
1200 Nineteenth Street, NW
Suite 700
Washington, DC 20036-2412
phone: (202) 861-3827
fax: (202) 689-8435
email: andrew.klein@DLAPiper.com

E. Barlow Keener
BrahmaCom, Inc.
32 Wexford Street
Needham, MA 02494
phone: (781) 433-0333 x026
email: bkeener@brahmacom.com

Scott Sawyer
Vice President of Regulatory Affairs & Counsel
Conversent Communications of Massachusetts, LLC
222 Richmond Street, Suite 301
Providence, RI 02903
phone: (401) 490-6377
email: ssawyer@conversent.com

Kristin L. Smith
Senior Attorney - Regulatory
Qwest Communications International Inc.
1801 California Street, 10th Floor
Denver, CO 80202
phone: (303) 383-6614
fax: (303) 896-9994
email: kristin.smith@qwest.com

Lance JM Steinhart
Law Office of Lance JM Steinhart, PC
1720 Windward Concourse, Suite 250
phone: (770) 232-9200
fax: (770) 232-9208
email: lsteinhart@telecomcounsel.com

Jennifer Hassen
Benjamin P. Thayer

Freedom Ring Communications, LLC
359 Corporate Drive
Portsmouth, NH 03801
phone: (603) 766-1000
fax: (603) 766-1050
email: jennifer@bayring.com; bthayer@bayring.com

Andoni Economou
Leo Maese
Metropolitan Telecommunications of Massachusetts, Inc.
44 Wall Street, 6th Floor
New York, NY 10005
phone: (212) 607-2004/(212) 607-2148
fax: (212) 635-5074
email: aeconomou@mettel.net; lmaese@mettel.net

Jodi J. Caro
Vice President and General Counsel
Looking Glass Networks, Inc.
111 West 22nd Street, Suite 600
Oak Brook, IL 60523
phone: (630) 242-2015
fax: (630) 242-2001
email: jodi.caro@lglass.net

Ken Duarte
Director of Carrier Relations and Regulatory Affairs
Volo Communications of Massachusetts, Inc.
151 S. Wymore Road., Suite 3000
Altamonte Springs, FL 32714-4254
phone: (407) 389-3232
fax: (407) 389-3233
email: kduarte@volocommunications.com

Chris Van de Verg
General Counsel
CoreTel Massachusetts, Inc.
209 West Street, Suite 302
Annapolis, MD 21401
phone: (410) 216-9865
fax: (410) 216-9867
email: chris@coretel.net

Peter Karoczkai, Senior Vice President
Paola Bulloch
A.R.C Networks Inc. d/b/a InfoHighway Communications
1333 Broadway, Suite 1001
New York, NY 10018
phone: (646) 536-6999/6954
fax: (212) 566-2136
email: pkaroczkai@infohighway.com; pbulloch@infohighway.com

Kevin J. Donahue
A.R.C Networks Inc. d/b/a InfoHighway Communications
175 Pinelawn Road, Suite 408
Melville, NY 11747
phone: (631) 815-1039
fax: (631) 815-1040
email: kdonohue@infohighway.com

Rebecca Sommi
Vice President, Operations Support
Broadview Networks Inc./Broadview NP Acquisition Corp.
400 Horsham Road
Horsham, PA 19044-2190
phone: (215) 293-8715
fax: (215) 293-8750
email: rsommi@broadviewnet.com

Bob Oberlin
Bullseye Telecom Inc.
25900 Greenfield Road, Suite 330
Oak Park, MI 48237-1267
phone: (248) 784-2500
fax: (248) 784-2501
email: boberlin@bullseyetelecom.com

Beth Choroser
Comcast Cable Communications
1500 Market Street
Philadelphia, PA 19102-2148
phone: (215) 981-7893
fax: (215) 640-7030
email: beth_choroser@comcast.com

Anthony Hansel

Senior Counsel
DIECA Communications Inc. d/b/a Covad Communications Company
600 14th Street, NW, Suite 750
Washington, DC 20005
phone: (202) 220- 0410
fax: (202) 220-0401
email: thansel@covad.com

Sean Dandley
President and CEO
DSCI Corporation
1050 Waltham Street, Suite 510
Lexington, MA
phone: (781) 862-4603
fax: (781) 862-4545
email: sdandley@dscicorp.com

Michael J. Shortley, III
1080 Pittsford-Victor Road
Pittsford, NY 14534
phone: (585) 1429
fax: (585) 218-8579
email: michael_shortley@globalgrossing.com

Scott Kellogg
Essex Acquisition Corp.
180 North Wacker Drive, Suite 3
Chicago, IL 60606
phone: (312) 658-1056
fax: (312) 658-5487
email: skellogg@veranet.net

Carl Wolf Billek
Andrew D. Fisher
IDT America Corp.
520 Broad Street
Newark, NJ 07102-3111
phone: (973) 438-4854/3683
fax: (973) 438-1455
email: carl.Billek@corp.idt.net; andrew.fisher@corp.idt.net

Marva Brown Johnson, Senior Counsel
Chad Pifer, Regulatory Counsel

KMC Telecom Inc.
1755 North Brown Road
Lawrenceville, GA 30043
phone: (678)985-6220/6441
fax: (678) 985-6213
email: mabrow@kmctelecom.com; rpifer@kmctelecom.com
Lisa Evans
SpectroTel, Inc.
655 Shrewsbury Avenue
Shrewsbury, NJ 07702
phone: (732) 345-7848
fax: (732) 530-1532
email: lisa.evans@spectrotel.com

Francie McComb
Associate General Counsel
Talk America, Inc.
6805 Route 202
New Hope, PA 18938
phone: (215) 862-1517
fax: (215) 862-1085
email: fmccomb@talk.com

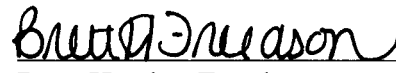
Doug Kinkoph
Vice President, Regulatory & External Affairs
XO Communications Inc.
XO Massachusetts Inc.
Two Easton Oval, Suite 300
Columbus, OH 43219
phone: (614) 416-1468
fax: (614) 629-3201
email: doug.kinkoph@xo.com

Rex Knowles
Vice President, Regulatory & External Affairs
XO Communications, Inc.
111 E. Broadway, Suite 1000
Salt Lake City, UT 84111
phone: (801) 983-1504
fax: (801) 983-1667
email: rex.knowles@xo.com

Michael J. Goldey

PAETEC Communications
81 Highfield Road
Harrison, NY 10528
phone: (914) 967-3312
fax: (910) 967-2183
email: m.goldey@mindspring.com

Dave Berndt
Director of Regulatory Affairs
Lightship Telecom
One Executive Park Drive
Bedford, NH 03110
phone: (603) 314-2360
fax: (603) 314-6420
email: dberndt@lightship.com


Brett Heather Freedson

**Before the
MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Petition of Verizon New England Inc. for)
Arbitration of an Amendment to Interconnection)
Agreements with Competitive Local Exchange) D.T.E. 04-33
Carriers and Commercial Mobile Radio Service)
Providers in Massachusetts Pursuant to Section)
252 of the Communications Act of 1934, as)
Amended, and the *Triennial Review Order*)

REPLY BRIEF OF THE COMPETITIVE CARRIER GROUP
TO ADDITIONAL BRIEFING ISSUES

I. INTRODUCTION

A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, Broadview Networks Inc. and Broadview NP Acquisition Corp., Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., DIECA Communications Inc. d/b/a Covad Communications Company, DSCI Corp., IDT America Corp., KMC Telecom V, Inc., and XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.) (collectively, members of the "Competitive Carrier Group"), in accordance with the Department's March 1, 2005 and March 10, 2005 Briefing Orders, file this response to Verizon's brief regarding the effect of change of law provisions in the parties interconnection agreements. Before responding to Verizon's arguments regarding specific contract provisions, the Competitive Carrier Group emphasizes that nothing in the *Triennial Review Order* or the *Triennial Review Remand Order* is self-executing. Any change of law resulting from these orders must be implemented through the interconnection agreement amendment process. Accordingly, the members of the Competitive Carrier Group have participated in this arbitration process to implement such changes of law.

Moreover, although Verizon continues to argue that its unbundling obligations are limited to those set forth in section 251(c)(3) of the Act, Verizon's obligations are actually governed by Applicable Law, which is broader than section 251(c)(3). Applicable Law includes section 271 of the Act, the FCC's Bell Atlantic/ GTE merger conditions as well as Massachusetts state law. The Competitive Carrier Group has fully addressed this issue in its Initial and Reply Briefs. The position of the Competitive Carrier Group is supported by the contract provisions of their respective interconnection agreements as discussed in detail below.

II. RESPONSE TO VERIZON BRIEF FOR GROUP 1

Verizon identifies DSCI Corp. ("DSCI") in its Group 1 of CLECs for which Verizon claims that the Agreement "contain[s] terms that permit Verizon MA to cease providing UNEs that are not subject to an unbundling obligation under 47 U.S.C. §251(c)(3), either immediately or after a specified notice period."¹ As stated in our Initial Brief on this issues, the *Triennial Review Order* and the *Triennial Review Remand Order* constitute a change of law, which invokes section 4.6 of the DSCI/Verizon Agreement and "requires that the parties negotiate in good faith a written interconnection agreement amendment to implement any changes in Applicable Law that materially affect any material provision of the Agreement, or the rights and obligations of the parties under the Agreement."²

In its Brief, Verizon relies on section 4.7 of the General Terms & Conditions, which provides that "as a result of any legislative, judicial, regulatory or other governmental decision, order or action, or if any change in Applicable Law, Verizon is not required by Applicable Law to provide any such Service." Verizon argues that this provision allows Verizon

¹ Verizon Response to March 1, 2004 Briefing Questions at 8.

² Competitive Carrier Group Initial Brief, Appendix 1, Section 4.6 of the DSCI/Verizon Agreement.

to bypass the amendment process set forth in section 4.6 of the Agreement and discontinue such services on 30-day's notice. Verizon also relies on section 1.5 of the UNE Attachment which provides in pertinent part that if it has been determined by the Department, the FCC, a court or other governmental body that Verizon is not required by Applicable Law to provide a UNE or Combination, Verizon may terminate such UNE or Combination.

Verizon's reliance on these provisions for justification to discontinue UNEs without amending the Agreement is flawed. In order to avoid the interconnection amendment requirement set forth in §4.6 of the Agreement, there must be finding, under **Applicable Law**, that Verizon no longer is required to provide access to a particular UNE or Combination. What Verizon fails to acknowledge is that Applicable Law, as defined in the definitions section of the Agreement, encompasses more than section 251(c)(3) of the Act. Specifically, Applicable Law is defined as "[a]ll effective laws, government regulations and government orders, applicable to each Party's performance of its obligations under the Agreement."³ All government regulations and orders includes section 271 of the Act, the FCC's merger conditions as well as Massachusetts state law. The Department is currently considering the impact of section 271, the FCC's merger conditions and Massachusetts state law on Verizon's unbundling obligations in this arbitration. Thus, there has been no finding by the Department that Verizon is relieved of its unbundling obligations under all Applicable Law and Verizon may not invoke section 4.6 of the General Terms & Conditions or 1.5 of the UNE Attachment to discontinue UNEs to Massachusetts CLECs outside of the interconnection agreement amendment process.

The *Triennial Review Order* and the *Triennial Review Remand Order* do, however, constitute a change in law and as such, the parties must invoke the interconnection

³ Competitive Carrier Group Initial Brief, Appendix 1, Section §2.8 of the DSCI/Verizon Agreement (attached).

amendment process under section 4.6 of the Agreement and execute a formal, written amendment that properly incorporates changes to the FCC's unbundling rules thereunder.

III. RESPONSE TO VERIZON BRIEF FOR GROUP 2

Competitive Carrier Group members Broadview Networks Inc. and Broadview NP Acquisition Corp. (together, "Broadview"), Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp. ("Cleartel"), and KMC Telecom V, Inc. ("KMC") are included in Verizon's Group 2. Both Broadview and Cleartel have the same interconnection agreement amendment provision as discussed above in Group 1.⁴ KMC has a similar provision that provides that the parties "shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action."⁵

Verizon relies on two sections of its Agreements with the above-mentioned Competitive Carrier Group members to justify its position that it may discontinue UNEs without an amendment to the Agreement. First, Verizon looks to section 11.0 of the Agreement which states, "BA shall not have any obligation to continue to provide such access with respect to any Network Element listed in Section 11.1 (or otherwise) that ceases to be subject to an unbundling obligation under Applicable Law." Verizon also looks to section 27.4, which states in pertinent part, "if, as a result of any decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that BA is not required to furnish any service, facility or arrangement...then BA may discontinue the provision of any such service facility, arrangement...."

⁴ Competitive Carrier Group Initial Brief, Appendix 1, Section 4.6 of the Broadview/Verizon and Cleartel/Verizon Agreements.

⁵ Competitive Carrier Group Initial Brief, Appendix 1, Section 27.3 of the KMC/Verizon Agreement.

As discussed above in response to Verizon's Group 1, there has been no finding that Verizon is relieved of its obligations under Applicable Law to continue providing access to unbundled network elements. Similar to DSCI, the Broadview, Cleartel and KMC agreements contain broad definitions of Applicable Law, which are listed below.

Broadview/Verizon Agreement & Cleartel/Verizon Agreement:

Applicable Law: All effective laws, government regulations and government orders, applicable to each Party's performance of its obligations under this Agreement.⁶

KMC/Verizon Agreement:

Applicable Law: means all laws, regulations and orders applicable to each Party's performance of its obligations thereunder.⁷

The FCC's findings in the *Triennial Review Order* and *Triennial Review Remand Order* that Verizon is no longer obligated to provide nondiscriminatory access to certain UNEs under section 251(c)(3) of the Act does mean that it has been relieved of its unbundling obligations under Applicable Law. As demonstrated above, "all laws, regulations and orders" encompasses more than section 251(c)(3) of the Act and clearly includes section 271 of the Act as well as the FCC's merger conditions and Massachusetts state law.

Accordingly, Verizon's interpretation of the contract provisions is wrong. There has been no finding under Applicable Law that Verizon is relieved of its obligation provide Massachusetts CLECs access to unbundled network elements. Rather, the Department is currently arbitrating whether Verizon must continue to unbundle certain network elements under section 271, the FCC's merger conditions and state law – all sources of Applicable Law. The

⁶ Broadview/Verizon Agreement, Section 2.8, Cleartel/Verizon Agreement, Section 2.8 (attached).

⁷ KMC/Verizon Agreement, Section 1.6 (attached).

FCC, in the *Triennial Review Remand Order*, makes clear that the FCC's unbundling determinations are not "self-effectuating," and, therefore, Verizon and Massachusetts CLECs must implement changes of law arising under the *Triennial Review Order* and the *Triennial Review Remand Order* only "as directed by section 252 of the Act." Thus, the Department must implement the FCC's findings through the interconnection agreement process, which it is currently doing and Verizon may not unilaterally begin discontinuing certain UNEs before the Department makes its finding regarding Verizon's obligations under all Applicable Law.

IV. RESPONSE TO VERIZON BRIEF FOR GROUP 5

DIECA d/b/a Covad Communications Corp. ("Covad") is identified in Verizon's Group 5.⁸ As noted by Verizon, the relevant change-of-law provides that,

The parties recognize that the FCC has issued and may continue to issue regulations implementing Sections 251, 252, and 271 and other Sections of the Act that affect certain terms contained in this Agreement. **In the event that any one or more of the provisions contained herein is inconsistent with any applicable rule contained in such FCC Regulations or may be enacted by the Department, or imposed by a court in the exercise of its lawful jurisdiction, or which, in BA's reasonable determination, affects BA's application pursuant to Section 271(d) of the Act, the Parties agree to negotiate in good faith the revisions necessary to eliminate the inconsistency or amend the application-affecting provision(s).** Such revisions need not be considered material, and need not require further Department approval beyond any Department approval required under Section 252(e) of the Act. If, however, any such change in Applicable Law or amendment to this Agreement would necessitate a change that would affect the interconnection of network facilities or Covad's ability to use any BA Service or Network Element, Covad

⁸ The precise contract language cited by the Competitive Carrier Group for the Covad/Verizon Agreement in its initial brief was the incorrect contract language, although the meaning and implications are the same. Consequently, attached to this section of the reply brief is the correct provision for implementing a change in law through an interconnection agreement amendment.

shall have a reasonable time to modify or re-deploy its network or operations to reflect such change. (28.3)⁹

The above-quoted provision from the Covad/Verizon Agreement clearly requires an amendment and, moreover, directly refers to the jurisdiction of the Department to determine the parties' obligations under the Agreement. In addition, section 29.19 of the Agreement provides that "[n]o modification, amendment, supplement to, or waiver to the Agreement or any of its provisions shall be effective and binding upon the parties unless it is made in writing and duly signed by the Parties."¹⁰ Thus, the agreement simply does not permit Verizon to discontinue UNEs without an amendment to the Agreement. In order to effectuate the changes of law from the *Triennial Review Order* and the *Triennial Review Remand Order*, Verizon is obligated to negotiate with Covad *in good faith*.

Moreover, the change in law provision recognizes Applicable Law, which is defined as "all laws, regulations, and orders applicable to each Party's performance of its obligations hereunder."¹¹ As with the agreements of the other members of the Competitive Carrier Group discussed above, this broad definition of Applicable Law encompasses not only section 251(c)(3) of the Act, but also section 271, as well as the FCC's merger conditions and Massachusetts state law. Accordingly, Verizon must follow the interconnection amendment process, including this arbitration, to implement any change in Applicable Law.

⁹ The quoted text in Verizon's Reply does not match the quoted language from the Agreement. Specifically the language quoted by Verizon omits references to the Department and a court of law.

¹⁰ Covad/Verizon Agreement, Section 29.19 (attached).

¹¹ Covad/Verizon Agreement, Section 1.7 (attached).

V. RESPONSE OF COMPETITIVE CARRIER GROUP MEMBERS NOT IDENTIFIED BY VERIZON

Verizon does not specifically dispute the change of law provisions in the Agreements of A.R.C. Networks Inc. d/b/a InfoHighway Communications Corp. (“InfoHighway”), IDT America Corp. (“IDT”), and XO Massachusetts, Inc. (“XO”). Despite the fact that Verizon presumably acknowledges that these interconnection agreements contain provisions that require an amendment to implement a change of law, Verizon nevertheless argues that it may ignore such provisions and discontinue certain UNEs without an amendment. Specifically Verizon argues that, “[i]n the TRRO, the FCC definitively banned new orders for delisted UNEs on or after March 11, 2005. No provision of the TRRO purports to make the Section 252 contract amendment process a precondition to compliance with that mandate.”¹²

As discussed above, and in more detail in the Competitive Carrier Group’s substantive Initial and Reply Brief, the FCC, in the *Triennial Review Order* and *Triennial Review Remand Order*, made specific references to the section 252 interconnection amendment process to implement its findings.¹³ Accordingly, Verizon cannot be permitted to bypass the interconnection amendment process with these carriers, nor any other carriers of the Competitive Carrier Group. The Department must reject Verizon’s efforts to unilaterally decide what will and will not be decided through this arbitration process.

VI. SUMMARY

For the reasons discussed above, the Department should find that nothing in the *Triennial Review Order* and the *Triennial Review Remand Order* is self-executing and any change in law resulting from these FCC orders must be implemented by the Department through

¹² Verizon Response to the Department’s March 10, 2005 Briefing Questions at 10.

¹³ See *Triennial Review Order* at ¶¶ 700-01, *Triennial Review Remand Order* at ¶ 233.

the section 252 arbitration process. With respect to the particular contract language disputed by Verizon in its Initial Brief, the Department should find that based on the clear change of law provisions and the broad definitions of Applicable Law contained in each of the Agreements, which includes sections 251 and 271 of the Act as well as the FCC's merger conditions and Massachusetts Law, Verizon may not discontinue providing nondiscriminatory access to any declassified UNE until there is a final order from the Department and such order has been incorporated into the parties' Agreement.

Respectfully submitted,



Genevieve Morelli
Brett Heather Freedson
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

Counsel to the Competitive Carrier Group

Dated: April 26, 2005

Attachments

requirements, including but not limited to the following: Directory Assistance, 911/E911, Operator Services (IntraLATA call completion), IntraLATA third party, collect and calling card, 800/888 database query, LIDB, and Voice Information Services Traffic as described in Section 5 of the Additional Services Attachment.

2.7 ANI (Automatic Number Identification).

The signaling parameter that refers to the number transmitted through the network identifying the billing number of the calling party.

2.8 Applicable Law.

All effective laws, government regulations and government orders, applicable to each Party's performance of its obligations under this Agreement.

2.9 ASR (Access Service Request).

An industry standard form, which contains data elements and usage rules used by the Parties to add, establish, change or disconnect services or trunks for the purposes of interconnection.

2.10 BFR (Bona Fide Request).

The process described in the Network Element Attachment that prescribes the terms and conditions relating to a Party's request that the other Party provide a UNE that it is not otherwise required to provide under the terms of this Agreement.

2.11 Business Day.

Monday through Friday, except for holidays observed by Verizon.

2.12 Calendar Quarter.

January through March, April through June, July through September, or October through December.

2.13 Calendar Year.

January through December.

2.14 CCS (Common Channel Signaling).

A method of transmitting call set-up and network control data over a digital signaling network separate from the public switched telephone network facilities that carry the actual voice or data content of the call.

2.15 Central Office.

A local switching system for connecting lines to lines, lines to trunks, or trunks to trunks for the purpose of originating/terminating calls over the public switched telephone network. A single Central Office may handle several Central Office codes ("NXX"). Sometimes this term is used to refer to a telephone company building in which switching systems and telephone equipment are installed.

2.16 Central Office Switch.

requirements, including but not limited to the following: Directory Assistance, 911/E911, Operator Services (IntraLATA call completion), IntraLATA third party, collect and calling card, 800/888 database query, LIDB, and Voice Information Services Traffic as described in Section 5 of the Additional Services Attachment.

2.7 ANI (Automatic Number Identification).

The signaling parameter that refers to the number transmitted through the network identifying the billing number of the calling party.

2.8 Applicable Law.

All effective laws, government regulations and government orders, applicable to each Party's performance of its obligations under this Agreement.

2.9 ASR (Access Service Request).

An industry standard form, which contains data elements and usage rules used by the Parties to add, establish, change or disconnect services or trunks for the purposes of interconnection.

2.10 BFR (Bona Fide Request).

The process described in the Network Element Attachment that prescribes the terms and conditions relating to a Party's request that the other Party provide a UNE that it is not otherwise required to provide under the terms of this Agreement.

2.11 Business Day.

Monday through Friday, except for holidays observed by Verizon.

2.12 Calendar Quarter.

January through March, April through June, July through September, or October through December.

2.13 Calendar Year.

January through December.

2.14 CCS (Common Channel Signaling).

A method of transmitting call set-up and network control data over a digital signaling network separate from the public switched telephone network facilities that carry the actual voice or data content of the call.

2.15 Central Office

A local switching system for connecting lines to lines, lines to trunks, or trunks to trunks for the purpose of originating/terminating calls over the public switched telephone network. A single Central Office may handle several Central Office codes ("NXX"). Sometimes this term is used to refer to a telephone company building in which switching systems and telephone equipment are installed.

2.16 Central Office Switch.

2.6 Ancillary Traffic.

All traffic that is destined for ancillary services, or that may have special billing requirements, including but not limited to the following: Directory Assistance, 911/E911, Operator Services (IntraLATA call completion), IntraLATA third party, collect and calling card, 800/888 database query, LIDB, and Voice Information Services Traffic as described in Section 5 of the Additional Services Attachment.

2.7 Automatic Number Identification (ANI).

The signaling parameter which refers to the number transmitted through the network identifying the billing number of the calling party.

2.8 Applicable Law.

All effective laws, government regulations and government orders, applicable to each Party's performance of its obligations under this Agreement.

2.9 ASR (Access Service Request).

An industry standard form, which contains data elements and usage rules used by the Parties to add, establish, change or disconnect services or trunks for the purposes of interconnection.

2.10 Bona Fide Request (BFR).

The process described in the Network Element Attachment that prescribes the terms and conditions relating to a Party's request that the other Party provides a UNE that it is not otherwise required to provide under the terms of this Agreement.

2.11 Business Day.

Monday through Friday, except for holidays.

2.12 Calendar Quarter.

January through March, April through June, July through September, or October through December.

2.13 Calendar Year.

January through December.

2.14 CCS (Common Channel Signaling).

A method of transmitting call set-up and network control data over a digital signaling network separate from the public switched telephone network facilities that carry the actual voice or data content of the call.

2.15 Central Office

A local switching system for connecting lines to lines, lines to trunks, or trunks to trunks for the purpose of originating/terminating calls over the public switched telephone network. A single Central Office may handle several Central Office

1.0 DEFINITIONS

As used in this Agreement, the following terms shall have the meanings specified below in this Section 1. All capitalized terms used but not defined herein shall have the meanings set forth in the Act.

1.1 "Act" means the Communications Act of 1934 (47 U.S.C. § 151 et. seq.), as from time to time amended (including, without limitation by the Telecommunications Act of 1996) and interpreted in the duly authorized rules and regulations of the FCC or the Department.

1.2 "ADSL" or "Asymmetrical Digital Subscriber Line" means a transmission technology which transmits an asymmetrical digital signal of up to 6 Mbps to the Customer and up to 640 kbps from the Customer.

1.3 "Agreement" means this Interconnection Agreement, including all Exhibits, Schedules, addenda and attachments referenced herein and/or appended hereto.

1.4 "Ancillary Traffic" means all traffic that is destined for ancillary services, or that may have special billing requirements, including but not limited to the following: BLV/BLVI, Directory Assistance, 911/E911, Operator Services (IntraLATA call completion), IntraLATA third party, collect and calling card, 800/888 database query, LIDB and information services requiring special billing as described in Section 7.1.

1.5 "ANI" or "Automatic Number Identification" means a signaling parameter which refers to the number transmitted through a network identifying the billing number of the calling party.

1.6 "Applicable Law" means all laws, regulations and orders applicable to each Party's performance of its obligations hereunder.

1.7 "BFR" or "Bona Fide Request" means the process described in Exhibit B that prescribes the terms and conditions relating to Level 3's request that BA provide an unbundled Network Element that it does not currently provide under the terms of this Agreement.

1.8 "Busy Line Verification" or "BLV" means an operator request for a status check on the line of a called party. The request is made by one Party's operator to an operator of the other Party. The verification of the status check is provided to the requesting operator.

1.9 "Busy Line Verification and Interrupt" or "BLVI" means a service that may be requested and provided when BLV has determined that a line is busy due to an ongoing call. BLVI is an operator interruption of that ongoing call to inform the called party that a calling party is seeking to complete his or her call to the called party.

1.10 "CCS" or "Common Channel Signaling" means a method of transmitting call set-up and network control data over a digital signaling network separate from the public switched

1.0 DEFINITIONS

As used in this Agreement, the following terms shall have the meanings specified below in this Section 1.0. For convenience of reference only, the definitions of certain terms that are As Defined in the Act (as defined below) are set forth on Schedule 1.0. Schedule 1.0 sets forth the definitions of such terms as of the date specified on such Schedule and neither Schedule 1.0 nor any revision, amendment or supplement thereof intended to reflect any revised or subsequent interpretation of any term that is set forth in the Act is intended to be a part of or to affect the meaning or interpretation of this Agreement.

1.1 "Act" means the Communications Act of 1934 (47 U.S.C. §151 et seq.) as amended by the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized rules and regulations of the FCC or a Department within its state of jurisdiction.

1.2 "ADSL" or "Asymmetrical Digital Subscriber Line" is a digital loop transmission technology which typically permits the transmission of up to 6 Mbps downstream (from the CO to the end-user customer) and up to 640 kbps digital signal upstream (from the end-user customer to the CO).

1.3 "Affiliate" is As Defined in the Act.

1.4 "Agreement" means this Interconnection Agreement under Sections 251 and 252 of the Act and all the Exhibits, Schedules, addenda, and attachments referenced herein and/or appended hereto

1.5 "Agreement for Switched Access Meet Point Billing" means the Agreement for Switched Access Meet Point Billing between the Parties.

1.6 "Ancillary Traffic" means all traffic that is destined for ancillary services, or that may have special billing requirements, including but not limited to the following: BLV/BLVI, Directory Assistance, 911/E911, Operator Services (IntraLATA call completion), IntraLATA third party, collect and calling card, 800/888 database query, LIDB, and information services requiring special billing arrangements between the Parties.

1.7 "Applicable Laws" or "Applicable Law" or "Law" means all laws, regulations, and orders applicable to each Party's performance of its obligations hereunder.

1.8 "As Defined in the Act" means as specifically defined by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department.

1.9 "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department.

orders up to the forecasted amount; and/or

(e) Covad has not submitted the order(s) for ULL or IOF through the standard electronic interface, provided that BA has made available to Covad a standard interface pursuant to this Agreement.

27.5 Sole Remedy

In the absence of gross negligence or willful misconduct, the credits described herein shall be the sole and exclusive remedy available for any failure by BA to provide the unbundled Network Elements in accordance with this Section 27 regardless of the existence or availability of any other remedy, procedure or process available to Covad at law or equity.

28.0 COMPLIANCE WITH LAWS; REGULATORY APPROVAL

28.1 Each Party shall promptly notify the other Party in writing of any governmental action that suspends, cancels, withdraws, limits, or otherwise materially affects its ability to perform its obligations hereunder.

28.2 The Parties understand and agree that this Agreement will be filed with the Department and may thereafter be filed with the FCC as an integral part of BA's application pursuant to Section 271(d) of the Act. The Parties covenant and agree that this Agreement is satisfactory to them as an agreement under Section 251 of the Act. Each Party covenants and agrees to fully support approval of this Agreement by the Department or the FCC under Section 252 of the Act without modification. The Parties, however, reserve the right to seek regulatory relief and otherwise seek redress from each other regarding performance and implementation of this Agreement, including, without limitation, the conformance of this Agreement to the FCC Regulations as provided in subsection 28.3 below.

28.3 The Parties recognize that the FCC has issued and may continue to issue regulations implementing Sections 251, 252, and 271 and other Sections of the Act that affect certain terms contained in this Agreement. In the event that any one or more of the provisions contained herein is inconsistent with any applicable rule contained in such FCC Regulations or as may be enacted by the Department, or imposed by a court in the exercise of its lawful jurisdiction, or which, in BA's reasonable determination, affects BA's application pursuant to Section 271(d) of the Act, the Parties agree to negotiate in good faith the revisions necessary to eliminate the inconsistency or amend the application-affecting provision(s). Such revisions need not be considered material, and need not require further Department approval beyond any Department approval required under Section 252(e) of the Act. If, however, any such change in Applicable Law or amendment to this Agreement would necessitate a change that would affect the interconnection of network facilities or Covad's ability to use any BA service or Network Element, Covad shall have a reasonable time to modify or re-deploy its network or operations to reflect such change.

28.4 Except as provided in 28.4.1, in the event any Applicable Law other than the FCC

FCC Network Disclosure rules, promulgated pursuant to Title II of the Act and, in particular, Section 251(c)(5) of the Act, set forth in the FCC Regulations to the extent applicable. Covad shall be solely responsible for the cost and effort of accommodating such changes in its own network.

29.16 Survival

The Parties' obligations under this Agreement which by their nature are intended to continue beyond the termination or expiration of this Agreement, including but not limited to Section 29.4, shall survive the termination or expiration of this Agreement.

29.17 Entire Agreement

The terms contained in this Agreement and any Schedules, Exhibits, tariffs and other documents or instruments referred to herein, which are incorporated into this Agreement by this reference, constitute the entire agreement between the Parties with respect to the subject matter hereof, superseding all prior understandings, proposals and other communications, oral or written. Neither Party shall be bound by any preprinted terms additional to or different from those in this Agreement that may appear subsequently in the other Party's form documents, purchase orders, quotations, acknowledgments, invoices or other communications.

29.18 Counterparts

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

29.19 Modification, Amendment, Supplement, or Waiver

No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties. A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options.

29.20 Successors and Assigns

This Agreement shall be binding on and inure to the benefit of the Parties and their respective legal successors and permitted assigns.

29.21 Publicity and Use of Trademarks or Service Marks

Neither Party nor its subcontractors or agents shall use the other Party's trademarks, service marks, logos or other proprietary trade dress in any advertising, press releases, publicity matters or other promotional materials without such Party's prior written consent.

1.0 DEFINITIONS

As used in this Agreement, the following terms shall have the meanings specified below in this Section 1.0. For convenience of reference only, the definitions of certain terms that are As Defined in the Act (as defined below) are set forth on Schedule 1.0. Schedule 1.0 sets forth the definitions of such terms as of the date specified on such Schedule and neither Schedule 1.0 nor any revision, amendment or supplement thereof intended to reflect any revised or subsequent interpretation of any term that is set forth in the Act is intended to be a part of or to affect the meaning or interpretation of this Agreement.

1.1 "Act" means the Communications Act of 1934 (47 U.S.C. §151 et seq.) as amended by the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized rules and regulations of the FCC or a Department within its state of jurisdiction.

1.2 "ADSL" or "Asymmetrical Digital Subscriber Line" is a digital loop transmission technology which typically permits the transmission of up to 6 Mbps downstream (from the CO to the end-user customer) and up to 640 kbps digital signal upstream (from the end-user customer to the CO).

1.3 "Affiliate" is As Defined in the Act.

1.4 "Agreement" means this Interconnection Agreement under Sections 251 and 252 of the Act and all the Exhibits, Schedules, addenda, and attachments referenced herein and/or appended hereto

1.5 "Agreement for Switched Access Meet Point Billing" means the Agreement for Switched Access Meet Point Billing between the Parties.

1.6 "Ancillary Traffic" means all traffic that is destined for ancillary services, or that may have special billing requirements, including but not limited to the following: BLV/BLVI, Directory Assistance, 911/E911, Operator Services (IntraLATA call completion), IntraLATA third party, collect and calling card, 800/888 database query, LIDB, and information services requiring special billing arrangements between the Parties.

1.7 "Applicable Laws" or "Applicable Law" or "Law" means all laws, regulations, and orders applicable to each Party's performance of its obligations hereunder.

1.8 "As Defined in the Act" means as specifically defined by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department.

1.9 "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department.